PUBLIC PROSECUTOR

v.

ISMAIL IBRAHIM

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CRIMINAL APPEAL NO: 43-3-97]
7 FEBRUARY 1998

CRIMINAL PROCEDURE: *Plea of guilty - Evidence of insanity - Whether court ought to accept plea of guilty - Accused probably insane during commission of alleged offence but fit to stand trial - Criminal Procedure Code, ss. 173(b), (m)(2), 323, 342(3), 346, 347, 348 - Penal Code, s. 84*

CRIMINAL PROCEDURE: *Plea of guilty - Evidence of insanity - Whether court bound to accept plea of guilty - Whether court may reject plea of guilty - Whether wrong to allow accused to plead guilty and be sentenced - Whether right to plead guilty is exclusive to accused - Whether accused who has insanity available as defence may still plead guilty - Whether court may order plea of not guilty to be entered - Duty of court to inquire into issue of insanity even when not raised by accused*

The accused was charged under s. 392 of the Penal Code ('the PC') and when brought before the court to answer the charge, the prosecution officer informed the court that the accused was not of sound mind and prayed that he be sent to a hospital for observation. Under s. 342(3) of the Criminal Procedure Code ('the Code') the accused was sent to a mental hospital for observation. On receipt of a medical report from the hospital which stated that the accused was stable after treatment, the prosecution proceeded to charge the accused. The accused pleaded guilty and the court was adjourned for facts and sentence. However, on the return day the charge was amended and when it was read to the accused and explained to him, he again pleaded guilty. The magistrate then sentenced the accused to a day's imprisonment with a fine of RM1,500 in default two months' imprisonment. Thereupon, the deputy public prosecutor requested that the case be reviewed in accordance with s. 323 of the Code on the ground that the magistrate should **not** have accepted the plea of the accused in the light of the medical report and following the provisions of s. 84 of the PC. The issues before the court were: (i) the legal effect of finding that a person is of unsound mind within the meaning of s. 84 of the PC; (ii) whether the court has the right to reject a plea of guilty; (iii) whether the right to raise a plea of insanity is exclusive to an accused; and (iv) the mode of trial to be conducted in making a finding of insanity. The fundamental issue

for determination was whether the guilty plea of an accused ought to be accepted by the court when there is some evidence to suggest that he was insane during the commission of the alleged offence but capable of making his defence at the trial.

Held:

[1] Section 84 of the PC states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Accordingly, s. 347 of the Code provides that the order to be made on such a person is one of acquittal and the finding shall state specifically whether he committed the alleged act with which he has been charged or not. Any order made under s. 348 of the Code is for the purpose of protecting society against the attacks of a lunatic and for his own protection and rehabilitation and cannot be regarded as a punishment in law or in fact. The law therefore provides that if the offence is not of a serious nature and the court is satisfied that such person can safely be released without the danger of him causing injury to himself or any other person, he may be cautioned and discharged.

[2] Sections 173(b) and 173(m)(2) of the Code provide that while it is the right of an accused person to plead guilty to a charge preferred against him, the court has an overriding duty to decide whether to accept the plea. The court will accept a guilty plea when it is satisfied that the accused understands the nature and consequences of his plea, but it is **not** bound to accept a plea of guilty in all cases and it can reject the guilty plea at any stage before sentence is passed.

[3] It is settled law that where an accused person wishes to raise the plea of insanity the onus of proof is on him. The effect of a successful plea of insanity is that no offence has been committed and the accused is entitled to an order of acquittal. It would be wrong in law to accept a plea of guilty by a person who would have succeeded on a plea of insanity, as the guilty plea would not amount to an offence due to absence of *mens rea*. Additionally, it would be wrong to allow an accused to plead guilty and be sentenced in order to avoid an order under s. 348 of the Code for whatever reason, as it would amount to a desire by the accused to gain a technical advantage which would make the guilty plea equivocal and not genuine. Therefore, to argue that the right to plead guilty is within the exclusive domain of the accused is contradictory to some of the fundamental principles of criminal jurisprudence. In those circumstances the guilty plea of the accused must **not** be accepted by the court and a

plea of **not guilty** must be entered. The corollary is that an accused person who has insanity available to him as a defence is **not** at liberty to enter a plea of guilty. It follows that even if the plea is not raised by the accused it is the duty of the court to enquire into it if there is evidence of such a plea on record.

[4] A plea of insanity can only be determined in a full trial and **not** after a guilty plea has been accepted. That is because as a successful plea of insanity will result in an order of acquittal, a full trial is warranted to hear all available evidence, in particular the manner in which the offence has been committed to enable it to make a ruling in the plea. Thus, where there is evidence of a plea of insanity on record, the court should **not** accept a guilty plea if there is one but should enter a plea of not guilty and conduct an enquiry on the issue on its own. The primary function of the court is to ensure that justice is done according to the law. It is an affront to all norms of justice to accept a guilty plea and thereafter enter a conviction merely to suit the convenience of an accused person when he has not committed any offence in the eyes of the law. It follows that the right to raise such a plea is **not** within the exclusive domain of the accused.

[5] In the case before the court, there was sufficient *prima facie* evidence on record to show that the accused was of unsound mind at the time of the commission of the alleged offence. Therefore, the learned magistrate ought to have rejected the plea of guilty of the accused and entered a plea of not guilty. It is mandatory to record that a plea of guilty has been accepted by the court and the failure to do so in the instant case went to the very foundation of the conviction as it indicated that the magistrate did not consider whether an offence had been disclosed by the facts before proceeding to impose sentence. Thus, the conviction was quashed and a plea of not guilty was entered and the case proceeded with. If the accused were to refuse to plead insanity as a defence, the court would itself conduct an inquiry into that issue in the course of the trial.

[Conviction and sentence quashed; plea of not guilty ordered to be entered.]

Cases referred to:
Abdul Kader Abdul Rahman v. PP [1984] 1 MLJ 80 ***(cit)***
Attorney General for South Australia v. Brown [1960] 44 Cr App R 100 ***(cit)***
Chen Cheng & Ors v. PP [1967] 2 MLJ 130 ***(cit)***
Heng Kim Khoon v. PP [1972] 1 MLJ 30 ***(cit)***
Koh Mui Keow v. R [1952] MLJ 214 ***(cit)***
Kuppusamy v. PP [1948] MLJ 25 ***(cit)***

Lee Weng Tuck & Anor v. PP [1989] 2 CLJ 120 ***(refd)***
Lian Kian Boon v. PP [1990] 2 CLJ 799 ***(cit)***
Lo Kim Peng & Ors v. PP [1979] 1 MLJ 249 ***(cit)***
Maxwell v. R [1996] 135 ALR 1 ***(refd)***
Mohammad Hassan v. PP [1997] 1 CLJ Supp 485 ***(refd)***
Munandu v. PP [1984] 2 CLJ 50 ***(refd)***
New Tuck Shen v. PP [1982] 1 MLJ 27 ***(cit)***
P Foster (Haulage) Ltd v. Roberts [1978] 2 All ER 751 ***(refd)***
Palan v. PP [1932] MLJ 124 ***(cit)***
Pendakwa Raya v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 147 ***(refd)***
PP v. Abdul Aziz [1978] 2 MLJ 155 ***(cit)***
PP v. Leng Chow Teng [1985] 1 CLJ 157 ***(cit)***
PP v. Mahmud [1974] 1 MLJ 85 ***(refd)***
PP v. Misbah Saat [1997] 1 CLJ 759 ***(refd)***
PP v. Nageswari [1994] 4 CLJ 419 ***(refd)***
PP v. Nahar Singh [1939] MLJ 239 ***(cit)***
PP v. Soon Tiew Choon [1976] 1 MLJ 189 ***(cit)***
PP v. Yong Chen [1952] MLJ 142 ***(cit)***
R v. Barnes [1970] 55 Cr App R 100 ***(cit)***
R v. Chiron [1980] 1 NSWLR 218 ***(cit)***
R v. Dickie [1984] 3 All ER 173 ***(cit)***
R v. Forde [1923] 2 KB 400 ***(cit)***
R v. Murphy [1965] VR 187 ***(cit)***
S (an infant) v. Manchester City Recorder [1969] 3 All ER 1230 ***(cit)***
Sau Soo Kim v. PP [1975] 2 MLJ 134
State v. Koli Jeram Duda [1955] Cr LJ 1628 ***(refd)***
Tukiran Taib v. PP [1955] MLJ 24 ***(cit)***

Legislation referred to:

Criminal Procedure Code, ss. 173(b), (m)(2), 323, 342(3), 346, 347, 348
Evidence Act 1950, s. 105
Penal Code, s. 84

Other sources referred to:

Archbold, 43rd edn, vol II, para 17-34
Penal Law of India, Dr Sir Hari Singh Gour, 10th edn, p 603

For the appellant - Maziah Abu
For the respondent - Vanaja; M/s A Rengganathan & Co

Reported by Michele Saw

JUDGMENT

Augustine Paul JC:

The original charge preferred against the accused in this case in the Magistrate's Court at Melaka is as follows:

> Bahawa kamu pada 6.7.97 jam lebihkurang 7.25 pagi, di Batu 5 Lorong Sidang Hassan Bukit Katil Melaka, di dalam Daerah Melaka Tengah, di Negeri Melaka, telah melakukan rompakan ke atas Dengkil Binti Taib KP3715812, dengan itu melakukan kesalahan dibawah Seksyen 392 Kanun Keseksaan dan boleh dihukum dibawah peruntukan yang sama.

On 11 July 1997 when the accused appeared in court to answer the charge made against him the prosecuting officer informed the court that there is reason to believe that the accused is not of sound mind and prayed that he be sent to a hospital for observation. The learned magistrate, in accordance with the provisions of s. 342(iii) of the Criminal Procedure Code ('the Code') ordered that the accused be sent for observation to a mental hospital for a period of one month in order to determine whether he is capable of making his defence. On 11 August 1997 the period of observation was extended for another one month on the application of the hospital authorities. On 10 September 1997 the prosecuting officer informed the court that the medical report on the accused had been received and requested for the case to be adjourned to refer the matter to the learned Deputy Public Prosecutor. The court record reveals that the learned magistrate had himself received the medical report on the accused on 5 September 1997. The material parts of the report read as follows:

> Penama diatas telah dimasukkan ke Hospital Permai pada 15hb Julai 1997 dibawah perintah Mahkamah Seksyen 342(iii) Kanun Peraturan Jenayah.
>
> 2. Beliau didapati menghidapi penyakit mental yang serious iaitu "Schizophrenia.
>
> 3. Pada pendapat saya, ketika kejadian seperti yang didakwa, besar kemungkinan beliau berada didalam keadaan mental yang tidak siuman.
>
> 4. Dengan rawatan yang diberikan, keadaan mentalnya ketika ini adalah stabil dan beliau dinasihatkan agar patuh menjalani rawatan ubat-ubatan dan susulan untuk jangka masa yang panjang kerana penyakit ini boleh berulang dari masa kesemasa.
>
> 5. Beliau kini faham akan tuduhan keatasnya dan didapati sihat untuk dibicarakan di mahkamah bagi tujuan membela diri.

The case was adjourned to 12 September 1997 when the prosecuting officer informed the court that he had been instructed by the learned Deputy Public Prosecutor to proceed with the charge. The charge was then read and explained to the accused who pleaded guilty. He understood the nature and consequences of his plea. The case was then adjourned to 16 October 1997 for facts and sentence. Upon the application on that day of learned counsel for the accused, who had then come on record, the case was stood down to the following day. On 17 October 1997 the prosecution tendered an amended charge which reads as follows:

> Bahawa kamu pada 6.7.97 jam lebihkurang 7.25 pagi, di Batu 5 Lorong Sidang Hassan Bukit Katil Melaka, didalam Daerah Melaka Tengah, di Negeri Melaka, telah melakukan rompakan sebanyak cincin keatas Dengkil Binti Taib (P) KP3715812, dengan itu melakukan kesalahan dibawah Seksyen 392 Kanun Keseksaan dan boleh dihukum dibawah peruntukkan yang sama.

When the amended charge was read and explained to the accused he again pleaded guilty. He understood the nature and consequences of his plea. The prosecution then tendered a statement outlining the facts of the case. It reads as follows:

> Aduan didalam kes ini ialah seorang perempuan Melayu nama Dengkil binti Taib KP 3715812 berumur 76 tahun, tidak bekerja dan beralamat di Batu 5, Lorong Sidang Hassan, Jalan Bukit Katil, Melaka Tengah, Melaka.
>
> Pada 06hb Julai 1997 jam lebihkurang pukul 7.25 pagi, apabila Yang DiTuduh bangun dari tidur di Batu 5, Lorong Sidang Hassan Bukit Katil, Melaka Tengah, Melaka, telah terus mendapatkan aduan. Yang Di Tuduh kemudian terus memegang tangan aduan dan cuba melucutkan cincin yang dipakai oleh aduan. Aduan cuba menolak tetapi Yang Di Tuduh telah menggigit tangan aduan dan kemudian telah merampas cincin yang dipakai oleh aduan.
>
> Aduan kemudian telah membuat pengaduan polis saperti dalam Balai Polis Bukit Baru Repot No. 1190/97. Kerugian dianggarkan RM150.00.
>
> Pada 06/07/97 jam lebihkurang pukul 8.00 pagi Yang Dituduh telah berjaya ditangkap oleh seorang penduduk kampung dan kemudian telah diserahkan kepada pihak polis.

The accused admitted the facts. In his plea in mitigation learned counsel said that the accused is aged 21 and worked as a contract labourer earning RM22 per day at the time of the offence. He had studied up to Form Five and is a first offender. Learned counsel said that the accused's guilty plea should be considered in his favour. As recorded in the notes of evidence learned counsel then said this:

Fakta rayuan paling penting – OKT disahkan oleh doktor sakit jiwa mengidap penyakit mental yang serius saperti surat dari Hospital Permai bertarikh 25.8.97. OKT sedang jalani rawatan dan ambil ubat setiap hari dibawah pengawasan bapa beliau. Semasa kejadian OKT telah tinggalkan rumah dan bapa OKT telah buat lapuran polis.

He added that the accused's father undertook to look after him if a lenient sentence was imposed and produced a letter of appeal from the father. The material parts of the letter read as follows:

Perkara: Rayuan bagi anak saya, Ismail bin Ibrahim

Adalah dimaklumkan kepada Yang Arif tuan bahawa anak saya Ismail bin Ibrahim telah dituduh di Mahkamah ini dibawah Sesyen 392 K.K. sebagaimana Kes Tangkap No. 367/97 dan akan dijatuhkan hukuman pada 16.10.97.

2. Disini ingin saya membuat rayuan bagi pihak anak saya yang mana sebagaimana maklum bahawa anak saya ini tidak dapat memberikan rayuan dengan baik kerana keadaannya yang tidak stabil disebabkan sakit jiwa. Dengan rayuan ini saya sangat-sangat berharap agar dapat tuan memberikan hukuman yang ringan terhadapnya. Faktor-faktor peringanan adalah saperti berikut:

2.1 Didalam kejadian ini, keadaan anak saya itu sedang mengalami sakit jiwa. Ini dapat disahkan dengan penghantaran beliau ke Hospital Sakit Jiwa oleh Mahkamah yang mulia ini. Sungguh pun telah dibebaskan, beliau masih menjalani rawatan yang berterusan.

2.2 Dengan mengetahui hakikat ini, pengadu yang membuat lapuran polis tersebut telahpun membuat permohonan kepada Yang Arif Timbalan Pendakwa Raya untuk menarik balik pertuduhan yang dibuat terhadap anak saya ini. Surat berkaitan dikembarkan.

2.3 Pengakuan bersalah anak saya itu telah menunjukkan bahawa dia telah sedar dan insaf diatas segala perbuatan yang tidak disengajakan oleh beliau.

2.4 Bagi pihak saya pula, sebagai penjaga, saya telah membuat segala arahan yang diberikan oleh doktor sakit jiwa dan menjaga rawatan keatasnya dengan lebih rapi lagi agar beliau tidak membuat perkara-perkara yang tidak diingini. Pada hari kejadian juga, saya ada membuat lapuran polis diatas kehilangannya kerana saya berasa bertanggungjawab diatas apa saja perbuatan yang akan dilakukan olihnya.

2.5 Selain telah dimaafkan oleh pengadu, ingin dinyatakan bahawa kejadian ini tidaklah mendatangkan kerugian yang besar kepada pengadu.

3. Dari faktor diatas, saya dengan rendah diri memohon kepada tuan agar tidak mengenakan hukuman penjara kerana ini akan menambahkan tekanan jiwa kepada anak saya itu dan saya percaya penyakitnya akan sukar dirawati. Saya sebagai bapanya membuat pengakuan ini untuk sanggup menjadi penjamin kepada anak saya itu jika beliau dibebaskan dengan ikat jamin. Masa depan anak saya ini akan bergantung besar kepada hukuman yang akan tuan jatuhkan kelak.

Sekian dengan ucapan terima kasih diatas pertimbangan yang arif tuan.

The prosecuting officer confirmed that the accused has no previous convictions and asked for a sentence which is appropriate to the crime with which he has been charged. The learned magistrate then sentenced the accused to a day's imprisonment and a fine of RM1,500 in default two months' imprisonment.

The matter did not end there. The learned Deputy Public Prosecutor, by letter dated 26 November 1997, requested that the case be reviewed in accordance with s. 323 of the Code. Her view was that the learned magistrate should not have accepted the plea of the accused in the light of the medical report which I have reproduced earlier. I decided to review the proceedings in the court below by way of revision and both parties were notified to present their argument in court on 9 January 1998. In her submission before me the learned Deputy Public Prosecutor repeated what she had stated in her letter and contended that the learned magistrate ought to have rejected the plea of the accused and proceeded with the trial in view of his mental condition at the time of the commission of the offence and the resultant order to be made following the provisions of s. 84 of the Penal Code ("s. 84") which reads as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

In support of her argument she referred to *PP v. Nageswari* [1994] 3 MLJ 463 which did not follow the earlier case of *Pendakwa Raya v. Zainal Abidin bin Mohd Zaid* [1993] 1 CLJ 147 in this area of the law. In her reply learned counsel for the accused said that the only issue for consideration was whether the accused was fit to plead at the time the plea was taken from him. As he was fit to plead s. 84 did not apply as the accused chose not to raise insanity as a defence. The fact that the issue of insanity was pleaded in mitigation does not mean that it should be considered as a defence. Her argument was in line with the subsequent case of *PP v. Misbah bin Saat* [1997] 3 MLJ 495 which in turn declined to follow *Nageswari*. She accordingly prayed that the application by the prosecution be dismissed.

The fundamental issue for determination in this application is whether the guilty plea of an accused person ought to be accepted by the court when there is some evidence before it to suggest that he was insane at the time of the commission of the alleged offence but capable of making his defence at the time of the trial. This issue has been addressed in the trilogy of cases emanating from the High Court in *Zainal Abidin bin Mohd Zaid*, *Nageswary* and *Misbah bin Saat.*

Section 342 of the Code provides that the court is duty-bound to ensure that an accused person appearing before it is capable of making his defence if there is reason to suspect that he is of unsound mind. In other words the duty of the court is to ensure that he is fit to plead. Once the court is satisfied that the accused is fit to stand trial then the trial should proceed even though he was of unsound mind at the time of the commission of the offence. If the accused can then establish that he was of unsound mind at the time of the commission of the offence he is entitled to raise the defence of insanity as provided by s. 84. The burden is on the accused to establish his insanity. As Shankar J (as he then was) said in Zainal Abidin bin Mohd Zaid at p. 149:

> The issue as to whether an accused person was insane in the sense required by s. 84 of the Penal Code is a matter for the court. Legal insanity is not for the medical witnesses to decide however eminent they may be. That onus is upon the defence and it is to satisfy the court on the balance of probabilities only. It can be discharged from evidence adduced from the prosecution or from defence witnesses. It is a lighter burden than that cast upon the prosecution who must prove the charge beyond reasonable doubt.

Sections 347 and 348 of the Code govern the procedure to be followed by the court once the plea of insanity has been successfully raised. Both the provisions read as follows:

Section 347.

> Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Section 348.

(1) Whenever the finding states that the accused person committed the act alleged, the court before which the trial has been held shall, if such act would, but for incapacity found, have constituted an offence, order such person to be kept in safe custody in such place and manner as the court

thinks fit and shall report the case for the orders of the Yang Di Pertuan Agong in respect of the Federal Territory, the Ruler or the Yang Di Pertua Negeri of the State, as the case may be, in respect of a State in which the trial is held: provided that if the court concerned is a Magistrate's court, the magistrate may in his discretion, if he considers that the offence charged is not of a serious nature and that such person can safely be released without danger of his doing injury to himself or any other person, caution and discharge him.

(2) The Ruler may order such person to be confined in a mental hospital during the pleasure of the Yang Di Pertuan Agong in respect of the Federal Territory, the Ruler or the Yang Di Pertua Negeri of the State as the case may be, in respect of a State.

In *Zainal Abidin bin Mohd Zaid* the accused was certified to be of unsound mind at the time of the commission of the alleged offence. The learned magistrate accepted his plea of guilt and committed the accused to the care of his bailor for safe custody pending the decision of the Ruler of the State in accordance with Chapter XXXIII of the Code. Upon an application for the revision of this order Shankar J (as he then was) said at pp. 149-150:

> The Magistrate's acceptance of a plea of guilt can be criticised to the extent that if insanity is established then the judgment has to be a special verdict of 'acquittal on ground of mental disorder.' (See s. 347 of the Code and para 586 of Archbold 36th Edn.) It is a contradiction in terms to say a person is guilty of an offence and then acquit. This may be the source of the learned DPP's dissatisfaction with the procedure adopted by the learned magistrate...
>
> In my view if the accused is of sufficiently sound mind to claim trial, he should likewise be able to admit the facts alleged against him by the prosecution. It is then open for the defence to raise the defence of insanity and rely upon the medical testimony before the court. The magistrate in this case was the sole fact finder, and in the absence of any contest from the prosecution I think he was quite entitled to proceed as he did.
>
> Consequently I would treat the recording of the plea of guilt as a mere irregularity which did not occasion any failure of justice. Section 422 of the Code covers the situation and no further remedial action is required. In future cases like this which are simple and straightforward, defence counsel should raise the defence immediately after the charge is read. If the facts are then admitted the court can proceed to determine if those facts will support a finding that the act alleged was committed and then consider the material in support of the insanity defence. Of course if there is any doubt on either issue, the court can and must insist on formal evidence being led.

In substance Shankar J (as he then was) took the view that a plea of insanity can be taken after a plea of guilty. In *Nageswary* Malik Ishak JC (as he then was) did not share this view. In holding that an order of acquittal on the ground of mental disorder should be made only after a full fledged trial his Lordship said at pp. 467-468:

> An order of acquittal on the ground of insanity (s. 347 of the CPC) and the safe custody of an accused person acquitted thereof by the High Court or the Sessions Court as the case may be or, as in the present case where the Magistrate's court handled the case (s. 348(i) of the CPC) must mean that the case was fully tried by adducing evidence through witnesses on both sides. An order of acquittal must follow after trial, whereas on pleading guilty there is no need for a trial to be conducted and a conviction would be recorded as a matter of course.
>
> I am aware of the decision of his Lordship Mahadev Shankar J in *PP v. Zainal Abidin* [1993] 1 CLJ 147, where his Lordship held a contrary view and applied s422 of the CPC to remedy the situation of the learned magistrate who had accepted a plea of guilty under s. 39 read with s. 49 of the Firearms Act 1960 (Rev No 206) and placed the accused to the care of his bailor for safe custody pending the decision of the Ruler of the State.
>
> I am of the considered view that the legislature in enacting s. 347 of the CPC must have intended that an order of acquittal on the ground of mental disorder should be made after a full-fledged trial. No short cut is allowed and any short cut like the present case where the accused pleaded guilty and the learned magistrate forthwith accepted the plea and after convicting the accused bound over the accused without adverting to s. 347 of the CPC must surely be wrong and such an error, omission or irregularity has occasioned a serious failure of justice. Section 422 of the CPC cannot be invoked to remedy the embarrassing situation.

Then came *Misbah bin Saat* which did not follow *Nageswary*. In *Misbah bin Saat* Visu Sinnadurai J in taking the view that an accused person who has been certified fit to plead though insane at the time of the commission of the alleged offence is entitled to plead guilty to the charge said at p. 507:

> As pointed out earlier, a trial judge needs to consider the issue of insanity either when it is raised as a defence or to determine whether the accused is fit to stand trial. If the accused does not raise the issue of insanity as a defence, the court is not duty-bound to determine this issue by conducting a full inquiry as to whether the accused was legally insane at the time of the commission of the offence. A duty is only imposed on the court to determine whether at the trial, the accused is fit to stand trial. Once the court is satisfied that he is fit to stand trial, the trial is conducted in the usual manner. Therefore, once it is established that the accused is in a fit state to stand trial, on a charge being read to him, the accused, like any other person on trial, has an option to plead guilty to the charge or not. Though the defence of insanity may be available

to the accused, yet he may, in exercise of his right, choose not to raise the defence. It must be remembered that if insanity as a defence is successfully raised, the accused, though securing an acquittal, is not set free like any other person who has been acquitted. The accused on acquittal will be sent to a mental hospital for an indefinite period of time.

His Lordship said that such a person may opt to plead guilty, even though the defence of insanity may be available to him, for a variety of reasons. In this regard his Lordship said at p. 508:

> Strictly speaking, an accused person who has recovered from his unsoundness of mind and who is fit to stand trial may choose not to raise the defence of insanity. What must be stressed is that the accused person, so long as he is fit to stand trial, he – like any other accused person – also has the right to raise the defence of insanity or not. As Geoffrey Lane LJ (as he then was) observed in *R v. Smith* [1979] 3 All ER 605 at p. 608:
>
> > Had the defence of diminished responsibility been run it would have been supported by those two doctors and would undoubtedly have succeeded. But, of course, it is a defendant's option whether he runs that defence or not, and the applicant chose not to ... (Emphasis added.)
>
> This observation of the right of the accused to avail himself of any of the defences is equally applicable in Malaysia.
>
> There are several reasons as to why an accused person, though medically insane at the time of the commission of the offence – and who is likely to succeed in raising the defence of insanity under s. 84 of the Code – may opt not to avail himself of this defence: the major reason being that he may not wish to be castrated by society by being labelled as insane or wish to be confined to a mental hospital for an indefinite period of time. He may also not wish to relive the trauma of the past by recounting the incident during the trial, especially so in cases where he had committed a grave offence against a family member. In some other cases, where the accused is no longer suffering from any mental impediments, he may simply choose to accept responsibility for his act. But whatever the reason, so long as he is fit to stand trial, his right to take whatever course of action prescribed by the law remains intact.

In further holding that the right to raise the defence of insanity is that of the accused alone and that neither the prosecution nor the court could raise that issue during a trial his Lordship said at p. 509:

> It should further be pointed out that the principle that only the accused has the right to raise the defence of insanity if he so wishes is so well-recognized that it has been held that neither the prosecution or the judge could raise the issue of insanity during a trial, if the accused has not himself raised this defence. In *R v. Dickie* [1984] 3 All ER 173, the English Court of Appeal pointed out at p. 178:

> ... we can find no precedent on which we should be inclined to rely for assuming that the prosecution has such a right. The prosecution has a positive duty to prove if it can the allegation which it makes on the indictment. It has the power if the issue is raised by the defence to rebut by its own evidence the attempt by the defence to establish insanity. It has the obligation, if it has evidence in its possession of insanity which will assist the defence to establish that the defendant was in that condition when the crime was committed, to make that evidence available to the defence in good time, so that in its discretion it may make proper use of it.

The Court of Appeal also observed that it was only in certain exceptional circumstances that a judge conducting a trial may on his own volition raise the issue of insanity. A judge, in such 'exceptional and rare' circumstances, must first be 'satisfied that there is relevant evidence which goes to all the factors involved in the M'Naghten test – that is, legal insanity.
(Emphasis added).

His Lordship took the view that it is not for the court to consider the mental state of the accused at the time of the commission of the offence if the defence of insanity is not raised by the accused. In reiterating that if the accused does not raise insanity as a defence there is no neccessity for the court to determine whether he was insane at the time of the commission of the offence his Lordship added at pp. 510-511:

> The judgment of Abdul Malik Ishak JC appears to suggest that the accused person had in fact raised the issue of insanity as a defence. However, the facts as stated above, do not indicate so. On the contrary, the facts clearly indicate that the question of insanity was only raised after conviction, and, that too, was for purposes of mitigation. It is therefore not clear as to why Abdul Malik Ishak JC was of the view that the magistrate had to consider the question of insanity at the time of the commission of the alleged offence when the defence of insanity was not raised.
>
> It may be that as the medical report which was tendered to the magistrate indicated that the accused was of unsound mind, the magistrate had to take cognizance of this fact. But the important factor to bear in mind is that it is not for the court to consider the mental state of the accused at the time of the commission of the offence if the defence of insanity is not raised by the accused. The court's responsibility is only to ensure that the accused is fit to stand trial. For this purpose, the medical report is relevant to assist the court in this finding. Furthermore, as pointed out earlier, whether the accused wishes to raise insanity as a defence is the sole prerogative of the accused. Therefore, if the accused does not raise insanity as a defence there is no necessity for the court to determine whether he was insane at the time of the commission of the offence.

In concluding the judgment his Lordship said that the guilty plea of an accused person who is presently fit to stand trial, but who may have been of unsound mind at the time of the commission of the offence, can be accepted and that a full trial need not be conducted and added at pp. 513-514:

> Finally, I wish to re-emphasize two other points: (i) there is no express provision in the Code or in the CPC to state that a person who was of unsound mind at the time of the commission of the offence but who had subsequently recovered and had been certified fit to stand trial cannot plead guilty to the charge; and (ii) s. 347 of the CPC is only applicable in cases where the accused had raised the defence of insanity under s. 84 of the Code and the court has been satisfied that he has successfully discharged the burden placed upon him to be sent to a mental home. Section 347 does not impose an obligation on the court to conduct a full trial whenever the court is aware of the previous mental condition of the accused. The question of insanity or unsoundness of mind of a person fit to stand trial can only arise if the defence of insanity is raised by the accused person himself.

In the light of the conflicting views expressed in the three judgments that I have referred to I consider it pertinent to address the following issues:

(a) the legal effect of a finding that a person was of unsound mind within the meaning of s. 84

(b) the right of the court to decide whether to accept a plea of guilty;

(c) whether the right to raise the plea of insanity is exclusive to the accused;

(d) the mode of trial to be conducted in making a finding of insanity.

I shall now consider the issues that I have identified.

(a) The Legal Effect Of A Finding That A Person Was Of Unsound Mind Within The Meaning Of Section 84

Section 84 states that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Accordingly, s. 347 of the Code provides that the order to be made on such a person is one of acquittal and the finding should state specifically whether he committed the alleged act with which he has been charged or not. Section 348 of the Code specifies the manner of dealing with such a person whenever the finding states that he has committed the alleged act. The rationale behind these provisions can be gathered from the *Penal Law of India* by Dr Sir Hari Singh Gour 10th Edn Vol where it says at p. 603:

> Jurists have given various reasons for the exemption of lunatics from criminal responsibility. It has been said that a mad man is best punished by his own madness. So it has been said that if a mad man commits an offence he shall not suffer for the act because being deprived of memory and understanding by the hand of God, he is regarded as having broken the mere words of the law, but not the law itself. The reason, however, why a mad man is exempt is that his acts being unintentional and involuntary, no court can correct them by punishment. Being deprived of free-will, a mad man is not placed even in a worse predicament than an infant under 7 years. For while the latter can at least control and regulate his acts, the former cannot. Being a victim of his impulses, his acts are as involuntary as they are unintelligent. It is idle to talk of his possessing mens rea for even his mind is not his own. He is, therefore, in all ages a fit object of commiseration; but as society has to be protected even against the attacks of maniacs, the Criminal Procedure Code provides for his detention to prevent mischief. But his detention is not his sentence.

In a case where s. 84 is in issue three principles of law require consideration. They are:

(i) that every person is presumed to be sane until the contrary is established;

(ii) that the onus of the prosecution is not merely to establish that the accused committed the offence but also to establish that he had the necessary *mens rea* to commit the offence; and

(iii) that the onus of proving insanity is on the accused under s. 105 of the Evidence Act 1950.

It will therefore be observed that s. 84 embodies the fundamental maxim of criminal law, that is to say, an act done does not constitute a crime unless done with a guilty intention. Thus where a plea under this section has been successfully raised the effect is that there is no culpability on the part of the accused as he did not have the required mens rea at the time of committing the alleged act. It follows that the question of the guilt of the accused does not arise as he cannot be said to have committed any offence. Therefore the law requires that an order of acquittal must be made with regard to the charge preferred against him. The court is only required to make a finding whether he committed the act or not. Any order made under s. 348 of the Code is for the purpose of protecting society against the attacks of a lunatic and for his own protection and rehabilitation and cannot be regarded as a punishment in law or in fact. Accordingly, the law even provides that if the offence charged

is not of a serious nature and the court is satisfied that such person can safely be released without danger of him doing injury to himself or any other person he may be released with a caution and discharge.

(b) The Right Of The Court To Decide Whether To Accept A Plea Of Guilty

The procedure to be followed by a magistrate before sentencing an accused who has pleaded guilty to the offence with which he has been charged is laid down in s. 173(b) and s. 173(m) (2) of the Code. Both the provisions read as follows:

> Section 173(b)
>
> If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon:
>
> Provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.
>
> Section 173(m)(2)
>
> If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law.

These two provisions make it manifestly patent that while it is the right of an accused person to plead guilty to a charge preferred against him the court has an overriding duty to decide whether to accept the plea. The authorities governing the exercise of this function by the court are now legion and I have reviewed most of them in *Mohammed Hassan v. PP* [1997] 1 CLJ Supp 485. The use of the words "... shall ascertain ..." in the proviso to s. 173(b) of the Code make compliance with the guidelines mandatory (see *PP v. Leng Chow Teng* [1985] 1 MLJ 229). In *Lee Weng Tuck & Anor v. PP* [1989] 2 MLJ 143 it was held that in order to determine the validity of a plea of guilty certain safeguards must be followed. They are, *inter alia*, as follows:

(i) the court must ascertain that the accused understands the nature and consequences of his plea; and

(ii) the court must ascertain that the accused intends to admit without qualification the offence alleged against him.

Although a plea of guilty is a confession of guilt, it does not of itself amount to a conviction. A conviction does not occur until there is an acceptance of the plea amounting to a determination of guilt by the court (see *Maxwell v. R* [1996] 135 ALR 1). Thus upon a guilty plea the court requires a summary

of the facts of the case to ensure that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him. The facts given should be confined to facts which the prosecution is able to prove and which are necessary to establish the charge (see *Chen Cheng & Ors v. PP* [1967] 2 MLJ 130; *Abdul Kader bin Abdul Rahman v. PP* [1984] 1 MLJ 80). It enable the court to ascertain whether admission of the facts amounts to a plea of guilty in law (see *Palan v. PP* [1932] MLJ 124; *PP v. Nahar Singh* [1939] MLJ 239; *Tukiran bin Taib v. PP* [1955] MLJ 24; *New Tuck Shen v. PP* [1982] 1 MLJ 27). It is the duty of a magistrate to defer acceptance of a plea of guilty until he has the facts alleged by the prosecution fully before him (see *PP v. Yong Chen* [1952] MLJ 142). The court accepts a guilty plea when it is satisfied that the accused understands the nature and consequences of his plea. This will be done after the accused has admitted the facts (see *PP v. Abdul Aziz* [1978] 2 MLJ 155; *Lian Kian Boon v. PP* [1991] 1 MLJ 51). The court is not bound to accept a plea of guilty in all cases. The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakable terms with full appreciation of the essential terms of the offence (see *Heng Kim Khoon v. PP* [1972] 1 MLJ 30). The plea should not be accepted by the court where on the facts admitted an accused person could not in law have been guilty of an offence (see *R v. Forde* [1923] 2 KB 400; *R v. Murphy* [1965] VR 187; *R v. Chiron* [1980] 1 NSWLR 218; *R v. Barnes* [1970] 55 Cr App R 100); *Sau Soo Kim v. PP* [1975] 2 MLJ 134; *Lo Kim Peng & Ors v. PP* [1979] 1 MLJ 249). This is for the reason that a plea of guilty to an offence unknown to the law is no plea at all (see *Heng Kim Khoon v. PP* [1972] 1 MLJ 30). As Shankar J (as he then was) said in Zainal Abidin bin Mohd Zaid at p. 149:

> One cannot plead guilty to the commission of an act which is not an offence in law.

Thus if the magistrate is in any doubt as to whether the plea is an unequivocal plea of guilty a plea of not guilty should be entered (see *Koh Mui Keow v. R* [1952] MLJ 214). As O' Connor J said in *P Foster (Haulage) Ltd v. Roberts* [1978] 2 All ER 751 at pp. 754-755:

> A court cannot accept an equivocal plea of guilty; it has no discretion in the matter; faced with an equivocal plea the court must either obtain an unequivocal plea of guilty or enter a plea of not guilty. For a plea to be equivocal the defendant must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged. An example of this type of qualification is found where a man charged with handling a stolen motor car pleads 'guilty to handling but I didn't know it was stolen'. It is not every

> qualification which makes a plea of guilty equivocal; for example, the burglar charged with stealing spoons, forks and a camera, who pleads 'guilty but I did not take the camera' is making an unequivocal plea to burglary.

A plea of guilty can be rejected by the court at any stage before sentence is passed (see *S (an infant) v. Manchester City Recorder* [1969] 3 All ER 1230). In *Munandu v. PP* [1984] 2 MLJ 82 the accused had pleaded guilty before a magistrate who accepted his plea and sentenced him. The High Court ordered a re-trial on the ground that the plea of the accused was not unequivocal based on certain matters raised by him in mitigation.

(c) Whether The Right To Raise The Plea Of Insanity Is Exclusive To The Accused

It is settled law that where an accused person wishes to raise the plea of insanity the onus of proof is on him. As I said earlier the effect of a successful plea of insanity is that no offence has been committed and the accused is entitled to an order of acquittal. To accept a plea of guilty by a person who could have succeeded on a plea of insanity is wrong in law as the plea will not amount to an offence due to absence of *mens rea*. Additionally, to allow such an accused person to plead guilty and be sentenced in order to avoid an order under s. 348 of the Code for whatever reason that he may have amounts to a desire by him to gain a technical advantage which makes the plea equivocal and not genuine. In this regard the High Court of Australia said in *Maxwell v. R* [1996] 135 ALR 1 at p. 7:

> The plea of guilty must, however, be unequivocal and not made in circumstances suggesting that it is not a true admission of guilty. Those circumstances include ignorance, fear, duress, mistake or even the *desire to gain a technical advantage.*
>
> The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.
>
> (Emphasis added.)

To argue therefore that the right to plead guilty, as on the facts of this case, is within the exclusive domain of the accused is, with respect, contradictory to some of the fundamental principles of criminal jurisprudence. In such circumstances the guilty plea of the accused must not be accepted by the court and a plea of not guilty must be entered. The corollary is that an accused

person who has insanity available to him as a defence is not at liberty to enter a plea of guilty. It follows that even if the plea is not raised by the accused it is the duty of the court to inquire into it if there is evidence of such a plea on record. In this regard I refer to *State v. Koli Jeram Duda* [1955] Cr LJ 1628 where Shah CJ and Baxi J said at p. 1629:

> But the learned Sessions Judge finds that by reason of unsoundness of mind the accused was incapable of knowing the nature of the act done by him and the question is whether this fact is proved and the accused is entitled to the benefit of s. 84, Penal Code.
>
> The question of the insanity of the accused was not raised or suggested until the trial in the Sessions Court. As I said, in his statement in the committing court the accused denied having caused injuries to his wife and also said that Jadar and other witnesses were telling a lie. In the Sessions Court he refused to say anything and behaved as if he did not understand anything.
>
> The learned counsel for the accused in the Sessions Court did not make any suggestion as to the insanity of the accused and it was the learned judge who put certain questions by the court to witness Surag Ravat as to the behaviour of the accused prior to the offence, because, it appears, the learned judge thought that it was necessary to explore that possibility, and later other witnesses were questioned on the point.
>
> The learned judge was no doubt justified in eliciting the information, and whether the plea was taken by the accused or not the fact does remain that if the evidence discloses the insanity of the accused at the material time then it has to be considered in weighing the criminality of the accused and in adjudging whether he was responsible for the crime or not.

I also refer to *Archbold* 43rd Ed Vol II which says at para 17-34:

> In certain exceptional circumstances a judge can of his own volition raise an issue of insanity and leave the issue to the jury providing there is evidence embracing all the relevant considerations in the Mc Naghten Rules ... . If a judge is minded to take such a course he must give counsel for the defence and for the prosecution the opportunity to all such evidence as they think necessary, even if that involves an adjournment of the trial. There is no precedent acknowledging the right of the prosecution to raise the issue of insanity. If the Crown has evidence of insanity it is obliged to make the evidence available to the defence: *R v. Dickie* [1984] 3 All ER 173 CA.

I must point out that even in *R v. Dickie* [1984] 3 All ER 173 referred to in Misbah bin Saat it was observed that in certain exceptional circumstances a judge conducting a trial may on his own volition raise the issue of insanity if he is satisfied that there is legal insanity.

(d) The mode Of Trial To Be Conducted In Making A Finding On Insanity

I agree with Malik Ishak JC (as he then was) when he said in Nageswary that a plea of insanity can only be determined in a full trial. It cannot be done after a guilty plea has been accepted for two reasons. Firstly, as a successful plea of insanity will result in an order of acquittal a full trial is warranted as such an order cannot be made after a plea of guilty. This is for the reason that an order of acquittal can be made only after hearing all the evidence (see *Kuppusamy v. PP* [1948] MLJ 25; *PP v. Soon Tiew Choon* [1976] 1 MLJ 189; *PP v. Mahmud* [1974] 1 MLJ 85). Secondly, the court would require all available evidence, in particular the manner in which the offence was committed, to enable it to make a ruling in the plea. In this regard it has been held that in order to make a finding on insanity the words and actions of the accused, both contemporary to the alleged offence and prior thereto, are relevant (see *Attorney General for South Australia v. Brown* [1960] 44 Cr App R 100). Such evidence will be available only in a full trial. Thus where a guilty plea has not been accepted by the court on the ground that a plea of insanity has been disclosed it should be treated as a plea of not guilty and the trial should proceed. As I said in Mohammed Hassan at pp. 498-499:

> The record must show that the plea of the accused has been accepted before recording a conviction (see *PP v. Yiap Tai Juan & Ors* [1957] MLJ 38 HC; *PP v. Tengku Hitam* [1962] MLJ 414 HC). A confession of guilt does not become a plea of guilty unless and until it is accepted. If not accepted, the confession ought not be recorded. In such cases the practice is to treat it as a plea of not guilty (see Sarkar, *Criminal Procedure Code,* at p. 451 cited with approval in *Lee Weng Tuck & Anor v. PP* [1989] 2 CLJ 120; [1989] 2 MLJ 143 at p. 147.

Although there is no explicit provision for this procedure currently in the Code the law that I have adverted to makes any specific provision to that effect superfluous.

The conclusion of what I have said thusfar is that a successful plea of insanity means that no offence has been committed and the accused must be acquitted. Such a finding can only be made after a full trial. Thus where there is evidence of such a plea on record the court should not accept a guilty plea if there is one. Instead the court should enter a plea of not guilty and conduct an inquiry on the issue on its own, if necessary. If the court does not do so then any verdict of guilty that it arrives at will be wrong in law as the facts will not disclose an offence due to absence of *mens rea* in the commission of the alleged offence. The primary function of the court is to ensure that justice is

done according to law. It is an affront to all norms of justice to accept a guilty plea and thereafter enter a conviction merely to suit the conveniences of an accused person when he has not committed any offence in the eyes of the law. It follows that the right to raise such a plea is not within the exclusive domain of the accused.

In this case there is sufficient *prima facie* evidence on record to show that the accused was of unsound mind at the time of the commission of the alleged offence. This is borne out by the medical report from the hospital and the letter to court from the father of the accused. In fact these two documents form the substratum of the plea in mitigation of the accused. As I said earlier the court is entitled to consider facts raised in mitigation in deciding whether to accept the guilty plea or not. In my opinion therefore the learned magistrate ought to have rejected the plea of guilty of the accused and entered a plea of not guilty instead for two reasons. Firstly, if the accused was of unsound mind at the time of committing the alleged offence then he cannot be found guilty of any offence and, accordingly, a conviction recorded against him would be wrong in law. Secondly, the sentence imposed on him would also be wrong in law as he would not be liable to any punishment. I interpolate to add that the proceeding before the learned magistrate suffers from another defect. The record does not indicate that the plea has been accepted by the court. This is a mandatory requirement and, as I said earlier, the record must show that it has been complied with. This defect goes to the very foundation of the conviction as it indicates that the magistrate did not consider whether an offence has been disclosed by the facts before proceeding to impose sentence.

In the upshot I quash the conviction and sentence imposed by the learned magistrate on the accused and order that a plea of not guilty be entered and the case be proceeded with as soon as possible. If the accused refuses to raise the plea of insanity as a defence the court should itself conduct an inquiry into that issue in the course of the trial.